No. 82-1724

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

RICHARD J. ARCARA
District Attorney
Erie County
Attorney for Petitioner
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202
(716) 855-2424

JOHN J. DeFRANKS
LOUIS A. HAREMSKI
JO W. FABER
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF NEW YORK,

Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

The following is submitted in response to certain of the arguments made on behalf of those maintaining positions contrary to that of the Petitioner. The points discussed, although dealing with distinct issues not covered in Petitioner's main brief, generally affirm the earlier presented contention that the statute under litigation has as its legitimate object the penalization of offensive conduct as opposed to punishment based upon status or sexual preference.

I

The statute is not overbroad as applied to Uplinger and others who engage in conduct identical to his.

Conceding that "indiscreet, overt and obtrusive"[1] public solicitations to engage in private sexual acts are subject to a constitutional proscription, Respondent Uplinger challenges the reach of §240.35 subd. 3 specifically as applied to his

[1] Uplinger Brief 26

conduct and the conduct of others acting in an identical manner. He suggests that solicitations including his to Officer Nicosia, which are "not lewd"[2] and are uttered "discreetly and politely,"[3] cannot be considered valid targets of the loitering provision. Uplinger asserts that relative to the matters at bar: "The State argues a case not before the Court. Indiscriminate sexual solicitation did not occur; none of the other argued offensive factual concerns were present."[4]

Firstly, no intentional avoidance of the legal realities of the present case can alter the fact that Susan Butler is a party/respondent to the present litigation. Her desultory, random solicitations directed at vehicles on a public street have been directly and unequivocally characterized as "indiscriminate" without challenge even by Respondent Butler. Nor is there any dispute that much of the testimony at the hearing held before Judge Drury in Buffalo City Court dealt largely with public solicitations by prostitutes to random members of the community. The significant incidence of prostitution in the present case works only to underscore the statute's asserted legitimacy.[5]

With respect to Mr. Uplinger's conduct, it cannot be said that it fits even within the niche he himself has carved out as beyond the statute's legitimate reach. As the record demonstrates, the defendant after introducing himself to undercover officer Nicosia, asked if the officer wanted "to get high."

---

[2]Id., at 6

[3]Id., at 28

[4]Id., at 25

[5]That prostitution is a prominent aspect of the pending litigation is evidenced not only by prostitute Susan Butler's imposing presence, but also by the fact that a second prostitute, Fredericka Sanders, whose case was joined with that of Uplinger and who, in fact, was represented by Uplinger's attorney, was originally a party in the appeals herein. Pet. for Cert. App. C lc and 3c. Therefore, it is most difficult to accept the sincerity of Uplinger's statement that "the statute's provisions are virtually unenforceable except as against homosexuals. . ." Uplinger Brief 34.

When Nicosia refused this offer, an exchange, initiated by Uplinger, began with each individual asking the other, "What do you like to do?" The two were joined by three or four other males whom Uplinger introduced to Nicosia on the steps of the premises at 140 North Street where they had all congregated. When a police vehicle approached and all were ordered off the steps, the group dispersed, each person walking in a separate direction.

Mr. Uplinger chose to follow Nicosia to ask if Nicosia "Wanted to go to his [Uplinger's] place." Upon Nicosia's inquiry as to what it was that Uplinger wanted, Uplinger responded to the effect, "Well, do you just want to come over." Nicosia, delivering his second refusal of the brief conversation, answered, "[N]o I'm scared with the police and I want to leave — I'm going to leave." To this Uplinger replied, "[W]ell if you drive me over to my place or go over to my place I'll blow you." (Joint App. 103-105)

For Respondent Uplinger to suggest that the above solicitation is "discreet and polite" is truly to exhibit that his perspective lacks any and all objectivity. His banal, vulgar solicitation was delivered to an individual he had never seen before after an encounter of only ten or fifteen minutes. Not only was there no indication of receptiveness on the part of Nicosia, but, in fact, the officer had twice rejected Uplinger's offers and had walked away unaccompanied. Uplinger pursued Nicosia in a real sense, not accepting the officer's refusals nor honoring his attempt to separate himself from Uplinger and the other males in the area. Moreover, Mr. Uplinger is presently barred from contending that the words of his offer to fellate Officer Nicosia were not lewd, since at the trial of his case he entered into a binding legal stipulation that the words "I'll blow you" indicate a proposition to engage in oral sex as understood by "lascivious"[6] adult males in the United States. (Joint App. 82)

---

[6]Webster's Third New International Dictionary of the English Language, Unabridged, 14th ed. (1961) lists "lewd" and "lustful " as synonymous cross-references having the same meaning as the word "lascivious."

There exists only one conceivable overly broad application of the statute in question. Such application would involve the arrest of one loitering in a deserted public place who in a discreet manner solicits another to engage in deviate sexual activity knowing that such solicitee is not a minor and is receptive to such a solicitation. Realistically such a situation if it ever exists, exists only in the most insignificant number of cases.

The record in Mr. Uplinger's case is devoid of any evidence that he lingered in the North Street area for any purpose other than satisfying his "lascivious" desires. The record is also absent an indication that there was no one else in the area who might have heard Mr. Uplinger's offer to engage in oral sodomy. What *is* established by the testimony is that Mr. Uplinger indiscreetly and lewdly solicited a person he barely knew who was clearly not receptive to the proposal.

Further, there is no indication in the present record that there exists any non-imaginary solicitor whose conduct would fall within that most narrow exception to the loitering statute. Respondent Uplinger has failed to establish that his or any other individual's conduct has been improperly restricted. This failure serves well to establish that there is not a "substantial" overreach to New York Penal Law §240.35 subd. 3 rendering the statute constitutionally overboard. *Broadrick v. Oklahoma,* 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973).

II

Respondents have failed to establish that the statute is unconstitutionally vague on its face or as applied to them.

Under an Orwellian spectre, Respondents urge that the vagueness of the statute renders it amenable to arbitrary and discriminatory enforcement, punishes individuals solely based upon their status, infringes upon their freedom of thought and

fails to give adequate notice of the conduct proscribed. Similar arguments are echoed in the briefs of *amici*. All of these claims misperceive the thrust of the statute at issue and offer but shrill and hollow warnings of unchecked police intrusion upon personal liberties.

The statute clearly defines a course of conduct which is deemed criminal. The public is on notice as to what is proscribed and, more importantly, no unwarranted discretion is left in the hands of law enforcement officers. *Kolender v. Lawson*, ____ U.S. ____, 103 S.Ct. 1855, 1858, 75 L. Ed. 2d 903, 909 (1983).

Fears of the Respondents that the present statute provides for arbitrary enforcement by police and prosecutors are unfounded. The statute does not permit the arrest of an individual who is merely standing on a corner giving no indication of an illegal purpose. One alone with his thoughts on a public street would not be subject to charge, for constitutional due process requirements would prohibit such action. Arrest must be based upon probable cause, dependent upon *prima facie* proof that the elements of a crime are present. One's purpose, as such is a necessary element of the loitering law, must be demonstrated by perceivable, overt conduct prior to any arrest.

With respect to Respondent Butler, her mental state, i.e. her purpose, was demonstrated by her waving at cars randomly on a public street, immediately followed by her commission of a public act of sodomy. In the case of Respondent Uplinger, purpose was demonstrated by a clear and direct proposition to engage in an act of sodomy with Officer Nicosia.

As an additional safeguard, conviction is dependent upon proof beyond a reasonable doubt. This yet higher standard requires that articulable evidence as to mental state convince the trier of fact that there is no reasonable possibility that the accused did not commit the charged offense.

The statute at issue does not punish mere thought as Respondents suggest, but rather it punishes conduct, i.e. loitering, carried out for a statutorily proscribed objective. The criminal law is replete with other examples of offenses which are predicated upon[7] or escalated by[8] the particular intent of the actor.

In addition to suggesting that the statute could be arbitrarily enforced against mere thought, Respondents also aver that the statute can be improperly enforced based upon status alone. Respondent Uplinger contends that the statute is virtually unenforceable except as against homosexuals, while Respondent Butler, disagreeing, asserts that the statute targets not only homosexuals, but prostitutes as well. Contrary to the contentions of both, the statute in clear language focuses upon conduct and activity without reference to status or classification. The proscriptions relate not to sexual preferences nor to criminal status or reputation but rather to the legislatively perceived general offensiveness felt by those in the community who are indiscriminately solicited. The distinction is analogous to that made by this Court in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L. Ed. 2d 1254 (1968), a case dealing with a public drunkenness statute:

---

[7]In New York, for example, the possession of a rifle is not *per se* illegal, but possession with intent to use that weapon unlawfully against another is deemed criminal. Penal Law §265.01 subd. 2. Similarly, the mere possession of obscene materials is not unlawful, but possession with intent to promote is proscribed. Penal Law §235.05 subd. 1.

[8]An actor's "intent to commit a crime" upon a premises elevates a trespass, Penal Law §140.10, to a burglary, Penal Law §140.20. Similarly, the possession of various controlled substances is deemed criminal, Penal Law §220.09, but is punished at a higher level where there exists an intent to sell, Penal Law §220.16.

> "The State of Texas thus has not sought to punish a mere status, as California did in *Robinson;* nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being 'mentally ill, or a leper. . .' " 392 U.S. at 532, 88 S. Ct. at 2154, 20 L. Ed. 2d at 1267.

In the course of her vagueness attack, Respondent Butler argues that there is sufficient legal machinery to combat street prostitution without the instant loitering statute. She identifies New York Penal Law §240.37 as a proper vehicle for such control.

Despite the existence of Penal Law §240.37, the loitering section is a legitimate, albeit distinct, tool for the regulation of commercial prostitution activity. While not requiring proof of repeated solicitation or evidence relative to payment, both of which are necessary for conviction under §240.37, the loitering statute accordingly imposes upon prostitutes convicted thereunder a less severe maximum penalty.[9] The statute properly recognizes the difficulties in proving monetary exchange as well as the general offensiveness of public solicitations, prostitution related or otherwise.

The obvious intent of the loitering statute is to punish conduct deemed offensive to individuals as well as to the

---

[9]An individual convicted of Penal Law §240.35 subd. 3 is guilty of a violation punishable by a maximum period of incarceration of fifteen days. An individual convicted of Penal Law §240.37, if previously convicted of the same offense or a prostitution related offense, is guilty of a Class B misdemeanor punishable by a maximum period of incarceration of ninety days.

community at large. Focusing on public activity rather than status, the statute attempts to regulate and control commercial and noncommercial solicitations for deviate activity as well as public acts of sodomy as a means of preserving the public order.

Not only do Respondents challenge the alleged arbitrary enforcement of the statute, but they also challenge the failure of the statute to give adequate notice of the conduct which it proscribes. Under the facts of this case, neither Respondent can complain of any lack of notice since the conduct of each falls clearly within the ambit of the statute.

Notably Respondent Uplinger's motion to dismiss the charge on the ground that the facts set forth failed to establish the offense charged (Joint App. 13), a necessary precursor to his particular vagueness challenge, was withdrawn upon Uplinger's stipulation that his words spoken constituted an offer to commit an act of deviate sexual intercourse, i.e. oral sodomy (Joint App. 82). The conduct of Respondent Butler, like that of Respondent Uplinger, was equally embraced by the statute; her public solicitations directed toward passing cars were followed by the commission of an act of oral sodomy observed by the arresting officer. At *nisi prius* Butler made no motion contesting the sufficiency of the factual allegations. Since there can be no claim by either Respondent that the sexual conduct proposed or engaged in was not within the clear terms of the statute, there can be no claim of vagueness with respect to their particular acts.

Nor may a challenge to the phrase "other sexual behavior of a deviate nature" be deemed a facial attack on the statute. A "facial" challenge to the vagueness of the statute embraces the concept "that the law is 'invalid *in toto* — and therefore incapable of any valid application.' *Steffel v. Thompson,* 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 29 L.Ed.2d 505 (1974)." *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362, 369 (1982), n. 5. Even if it is

assumed that the Respondents, whose conduct is clearly embraced within the statute, may assert facial vagueness, the specific contention herein is predicated solely upon the alleged infirmity of one portion of the statute, i.e. the phrase "other sexual behavior of a deviate nature." Accordingly the attack does not constitute a valid facial challenge inasmuch as it does not reach the statute *in toto*. In this context the challenge is precluded under controlling precedent.

Since this statute, both on its face and as applied, provides clear notice as to the conduct proscribed and is not susceptible to arbitrary and discriminatory enforcement, it may not be deemed unconstitutionally vague.

III

New York Penal Law §240.35 subd. 3 violates neither the right to privacy nor the right to equal protection.

As stated by the New York Court of Appeals, its decision on the issue of constitutionality in the instant case reflected and relied upon the court's earlier reasoning in *People v. Onofre*, 51 N.Y.2d 476, 434 N.Y.S.2d 947, 415 N.E.2d 936 (1980) cert. den. 451 U.S. 987, 101 S.Ct. 2323, 68 L.Ed. 2d 845 (1981). Finding that Penal Law §240.35 subd. 3 "suffers the same deficiencies as did the consensual sodomy statute," the court implicitly determined that said statute violated the right to equal protection under the law and the right to privacy as both are guaranteed by the federal Constitution. Respondent Uplinger concurs in the court's analysis, arguing specifically that his right to privacy was abridged because his intent was to commit the solicited act of sodomy at his "personal residence" and further that he suffered a violation of his right to equal protection because, "In addition to the discriminatory enforcement which is in fact practiced, the statute's provisions are virtually unenforceable except as against homosexuals. . ." (Uplinger Brief 39, 34)

Privacy

Neither the Court of Appeals not the Respondent Uplinger acknowledged the proper distinction to be made between the consensual sodomy statute which relates to a person's right to commit acts of deviate sexual intercourse in private and the instant loitering law which focuses on the act of soliciting as it occurs in public. While conceding that under *Onofre* Respondent Uplinger's private acts of sodomy would not be illegal, it is the Petitioner's position that the right to privacy does not encompass one's acts on a public street where such acts infringe upon the right of others to public order and tranquillity. Indicative of the State's legitimate authority to regulate acts in public which are protected in private is the case of Respondent Butler. Her act of sodomy, committed in an automobile on a public street, even in the absence of proof of the commercial nature of the transaction, is clearly not protected by the Constitution under the penumbral right to privacy. The enactment of statutes proscribing such public activity is undeniably within the valid legislative power of the State.

This distinction between public and private is exemplified by this Court's decisions in the companion cases of *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971), and *United States v. Reidel,* 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). In both cases, appellees urged that individuals should be entitled to import or to mail obscene materials which would subsequently be used in private relying upon the Court's language in *Stanley v. Georgia,* 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542, 550 (1969), that "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." This Court rejected the contentions, holding in *Thirty-Seven Photographs:*

> "That the private user under *Stanley* may not be prosecuted for possession of obscenity in his home does not mean that he is entitled to import it from abroad free from the power of Congress to exclude noxious articles from commerce. *Stanley's* emphasis was on the freedom of thought and mind in the privacy of the home. But a port of entry is not a traveler's home. His right to be let alone neither prevents the search of his luggage nor the seizure of unprotected, but illegal, materials when his possession of them is discovered during such a search." 402 U.S. at 376, 91 S.Ct. at 1408, 28 L.Ed.2d at 834.

This distinction was further delineated in *Reidel*:

> "The focus of this language [as cited in *Stanley*] was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution." 402 U.S. at 356, 91 S.Ct. at 1412-1413, 28 L.Ed.2d at 817-818.

As applied to the case at bar, such analysis indicates that protection of sexual behavior conducted in private between consenting adults is not a proper predicate for invalidation of legislation prohibiting public solicitation to engage in deviate sexual activity. In contradistinction to the restraints imposed upon access to obscene materials in *Reidel* and *Thirty-Seven Photographs*, a restriction on loitering in public for the purpose of soliciting or engaging in deviate sexual acts does not foreclose access to sexual partners. Under the foregoing analysis, Respondent Uplinger's assertion that he intended the act of sodomy to take place in the privacy of his home is insufficient to support his contention that his public acts were protected by a constitutional right to privacy.

In a somewhat different vein, Respondents contend that even restaurants and taverns could improperly become the situs of arrest under the instant loitering statute despite a clearly protected right to privacy enjoyed by patrons in such establishments. The New York Penal Law definition of "public place"[10] indeed appears to include a tavern, although intuitively such places of business are less "public" than city streets inasmuch as people are present by choice rather than necessity, children are for the most part excluded, and those who are easily offended are generally not in attendance.

Assuming, however, that such establishments do fall within the statutory definition of "public place," a statutory prohibition of loitering for the purpose of soliciting or engaging in deviate sexual activities which extends to such premises does not impermissibly abrogate the constitutionally protected right to privacy of a solicitor. The legislative intent to protect citizens from harassing solicitations obviously transcends the walls of restaurants and bars; people enjoying food or drink in such public places certainly cannot, due to mere presence, be characterized as receptive to sodomous solicitations.

Even with respect to bars catering to a homosexual population, neither the Record nor the briefs, including those of *amici,* establish that homosexuals who frequent such businesses are receptive to impulsive, indiscriminate sexual solicitations. Unquestionably, solicitations by homosexual prostitutes would constitute an annoyance to many homosexual persons no matter where delivered. Moreover, as long as such establishments remain public, the danger exists that those who enter unaware of the sexual preferences of the majority of the clientele might unexpectedly experience offense.

In reality, Respondents assert their right to solicit others

---

[10]New York Penal Law §240.00 subd. 1.

based upon their own receptiveness to or predilection for such solicitations. Such reasoning is analogous to that of a disorderly and intoxicated individual who maintains his right to be publicly intoxicated merely because he personally is not offended by the public conduct of others similarly inebriated. The appropriate response to both the public drunk and the public solicitor is that their conduct should be restricted to private premises such as private clubs whose patrons are put on notice as to what activities are tolerated. In the alternative their energies should be directed toward convincing the Legislature that their conduct, contrary to lawmakers' perceptions, is no longer offensive to the general public.

Equal Protection

The Court of Appeals' reasoning in applying an equal protection analysis to the statute at issue is similarly flawed. Conceding for purposes of this case that the court properly invalidated the New York State consensual sodomy law as violative of the equal protection of unmarried persons, such decision is in no way determinative of the constitutionality of the statute at issue. While the statute does exclude from its sweep married persons who solicit their spouses in public areas while loitering, as noted in Petitioner's Brief, such exemption is not unrelated to the objective of the statute which is to "protect members of the public from being harrassed by indiscriminate solicitations of a lewd and intimate kind made by persons whom the solicitee neither knows nor seeks to know." (Petitioner Brief 28-29)

With respect to Respondent Uplinger's contention that the statute violates equal protection in that "the primary reach of the statute is directed to homosexuals" (Uplinger Brief 34), it is submitted that such assertion is definitively refuted by the posture of the instant case which includes not only Uplinger but

Butler who was arrested while performing a heterosexual act of deviate sex. The statute does not legislate that different treatment be accorded to persons placed by statute into different classes but rather focuses on an act which can be and, as indicated by the case at bar, is committed by both men and women and by persons who are heterosexual as well as homosexual in their preferences. All persons, not distinguished by statutory classification save for the above noted rational exemption for persons married, are treated alike.

IV

Review is in no sense prohibited by the action of the court below.

Respondent Uplinger argues under Point II of his brief that the New York Court of Appeals first narrowed Penal Law §240.35 subd. 3 by statutory construction, then determined that, as construed, the statute was unconstitutional. He concludes that this Court is bound by the alleged construction in reviewing the correctness of the finding of unconstitutionality.

It should from the outset be emphasized that the New York Court of Appeals, rather than giving any saving construction, totally invalidated Penal Law §240.35 subd. 3. Statutory construction, of necessity, entails a determination as to the proper meaning or application of provisions contained in legislative acts (Black's Law Dictionary, *5th ed.*, McKinney's Statutes §71). In the instant case, the court below made no attempt to explain the meaning of any of the statutory elements of the offense nor did it proffer any conclusions with respect to the questions of how, where, when or to whom the statute at issue should be applied.

In addition it has been determined that the general intent of statutory construction is to maintain the spirit and purpose of

the statute while bringing it into harmony with constitutional requirements thus obviating the necessity for constitutional review by a higher court (*Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S.Ct. 1400, 1404, 28 L. Ed. 2d 822, 830 (1971), McKinney's Statutes §96). The court attempted no interpretation of the law which could conceivably effect these purposes.

In invalidating the statute at issue the court did not construe but rather merely presented its reasoning for a finding of unconstitutionality. Its analysis was based solely upon its determination that Penal Law §240.35 subd. 3 "must be viewed as a companion statute to the consensual sodomy statute" (Pet. for Cert. App. B 2b). The court reasoned:

> "The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose. This statute, therefore, suffers the same deficiencies as did the consensual sodomy statute." (Pet. for Cert. 2b)

As stated by this Court in *New York v. Ferber*, ____ U.S. ____, 102 S.Ct. 3348, 3360, 73 L. Ed. 2d 1113, 1129 (1982): "While the construction that a state court gives a state statute is not a matter subject to our review, [citations omitted], this Court is the final arbiter of whether the federal constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents, as well as state court decisions giving the Constitution too little shrift." In that the court's finding of unconstitutionality rested exclusively upon legal reasoning linking the consensual sodomy statute to the instant loitering statute, Respondent cannot properly assert that such legal reasoning should be immune from review by this Court.

Furthermore, as expressed by the Court of Appeals in its Memorandum, "We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner or in an inappropriate place *even if the underlying purpose is not in violation of the law.*" (Pet. for Cert. App. B 2b, emphasis added). The legality or illegality of consensual sodomy as committed in private is thus not relevant to a determination of the validity of a statute proscribing public loitering for the purpose of soliciting; the gloss provided Penal Law §240.35 subd. 3 by Penal Law §130.38 may explicate but does not limit the meaning of the statute at issue and, therefore, cannot limit this Court's review of the statute as written by the Legislature.

The court also reasoned that the challenged statute could not be categorized as a harassment statute since it is devoid of a requirement that the conduct proscribed be offensive or annoying to another. Such argument does not narrow or define the statute, nor does it prevent this Court from validating the ostensible legislative intent to hold persons strictly liable for the public offense of loitering to solicit abnormal sexual activity, an act determined to be "a source of annoyance to, and harassment of, members of the public who do not wish to become involved." (Model Penal Code, §251.3, Comment, at p. 476)

Not only is the above reviewable because it represents reasoning rather than construction, but to the extent that it presents a position in opposition to that of the Legislature or attempts to define legislative intent, such a conclusion is not binding upon this Court. As stated in *Ward & Gow v. Krinsky,* 259 U.S. 503, 42 S.Ct. 529, 66 L.Ed. 1033:

> "Any suggestion from the state court in aid of the act fairly may be accepted; but a suggestion having an adverse effect, while entitled to respectful consideration, is not to be taken as weakening the action taken by the state through its legislative branch, or as furnishing an exclusive statement of the grounds upon which the Legislature acted." 259 U.S. at 520, 42 S. Ct. at 536.

In sum, it is submitted that the Memorandum decision of the New York Court of Appeals represents an invalidation, not a construction, of the statute at bar. The issue presented by the legal reasoning of the court, i.e. whether the Constitutional protections afforded an individual's right to privacy extend to immunize public conduct which the Legislature has determined to be an annoyance or nuisance to others, cannot be precluded from review by this Court.

CONCLUSION

THE JUDGMENT OF THE NEW YORK STATE COURT OF APPEALS SHOULD BE REVERSED.

Respectfully submitted,

RICHARD J. ARCARA
District Attorney
Erie County
Attorney for Petitioner
200 Erie County Hall
25 Delaware Avenue
Buffalo, New York 14202
(716) 855-2424

JOHN J. DeFRANKS
LOUIS A. HAREMSKI
JO W. FABER
Assistant District Attorneys
Of Counsel